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October 17, 2014

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 12-83

Dear Ms. Dortch:

On October 15, 2014, NCTA representatives Diane Burstein, Michael Schooler and I met with Maria Kirby, Legal Advisor to Chairman Wheeler, to discuss whether the statutory definition of a "multichannel video programming distributor" ("MVPD") can and should include online distributors of video programming ("OVDs").

During the meeting, we discussed NCTA's position, as set forth in our comments and reply comments in this docket, that expanding the definition of an MVPD to include OVDs would misconstrue the relevant statutory provisions of the Communications Act and raise a host of practical and regulatory concerns. Nevertheless, if the Commission intends to explore these issues in a rulemaking proceeding, it should seek comment on the full range of issues and potential consequences – intended and unintended – before reaching even any tentative conclusions that OVDs could qualify as MVPDs under the Act.

For instance, we pointed out some of the practical issues that would be raised by a proposal to extend MVPD status to any OVD that provides multiple streams of "linear programming" for purchase by consumers:

- Would any two streams of video content qualify as "linear programming" or would the video streams have to resemble programming provided by MVPDs when the statute was passed?
- Would the programming have to be available 24/7 or would something less suffice?
- Would OVDs streaming from outside the United States qualify?

- What does it mean to offer programming "for purchase" – would purchase of a device used to access an OVD's programming count?
- Would cable-owned programming networks be forced to make their programming available for distribution by *any* online entity that offered multiple streams of video programming, or would such networks be permitted to take steps to ensure, for example, that their programming is not forced to be distributed by a packager whose branding and/or selection of programming are not of a type with which the network wishes to be associated?[1]

Third, we asserted that to the extent the Commission finds that OVDs can qualify as MVPDs, they must be subject to the obligations of MVPD status as well as its benefits, including, for example, program carriage, EEO, closed captioning, emergency alerts, and the commercial availability of navigation devices. We pointed out the potential challenges of applying and enforcing such obligations in the OVD context, particularly if the OVD in question is operating overseas.

In addition, we noted that Congress and the Commission have imposed on cable operators – and to a lesser extent, on DBS providers – a multitude of specific obligations aimed at promoting various public interest objectives that would not, without changes to the law and rules, apply to OVDs (e.g., carriage of local broadcast stations, carriage of PEG or other public interest programming, equal time and lowest unit charge requirements for political speech). Giving OVDs the regulatory benefits that Congress provided to traditional facilities-based MVPDs without imposing any of the obligations that are borne by those traditional MVPDs would dilute and undermine the policy goals underlying those obligations.

Finally, we discussed the interplay between any FCC ruling that an OVD is an MVPD for purposes of its rules and an OVD's ability to obtain a cable statutory license pursuant to Section 111 of the Copyright Act. We explained that the Copyright Office has not expanded the cable statutory license to cover Internet retransmissions of broadcast television programming by OVDs, and that any FCC action to redefine an OVD as an *MVPD* would not mean that an OVD would qualify for the Section 111 license applicable to *cable systems*. Put differently, while there is a statutory license for "cable systems" and a separate statutory license for "satellite carriers" under the Copyright Act, there is no statutory license for "MVPDs" generally. This hole cannot be filled by the Commission.

For all these reasons, we reiterated that the best course for the Commission would be to adhere to the determination that the definition of an MVPD is limited to entities that provide a transmission path. In any event, to the extent that the Commission considers adoption of a Notice of Proposed Rulemaking, it should ensure that the plethora of legal, policy, practical and constitutional issues are raised and explored in a neutral and even-handed manner.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

cc: Maria Kirby

[1] These results might not only exceed the objectives of the program access rules, but also, as we noted, would impose burdens on the distribution of programming that raise serious First Amendment concerns – concerns that should be avoided by the Commission in determining how to interpret the statutory definition of an MVPD.